91-1498

Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

FRANK ALTAMORE

Petitioner,

v.

NEWSDAY, INC.,

Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE STATE OF NEW YORK

PETITION FOR CERTIORARI

LECCI, WOLIN & WOLIN, ESQS.
Attorneys for Petitioner
183 Broadway - Suite 316
Hicksville, N.Y. 11801
(516) 938-0030
By Alan E. Wolin, Esq.

QUESTIONS PRESENTED

1. Whether the State Courts' failure to vacate the arbitration award in issue, on the ground that it is violative of public policy, a federal question, conflicts with decisions of the United States Court of Appeals?

2. Whether the State Courts' failure to vacate the arbitration award in issue, on the ground that it is violative of public policy, a federal question, conflicts with applicable decisions of this Court and established Federal policy?

3. Whether the State Courts' failure to vacate the arbitration award in issue, on the ground that the arbitrator exceeded his authority, conflicts with applicable decisions of this Court?

LIST OF ALL PARTIES

1.	Frank Altamore[1]	Petitioner-Petitioner
2.	Newsday, Inc.	Respondent-Respondent

[1] Petitioner is an individual and therefore there are no parent companies or non wholly owned subsidiaries that need to be disclosed.

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No.

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NEWSDAY, INC.,

Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE STATE OF NEW YORK

PETITION FOR CERTIORARI

OPINIONS BELOW

To petitioner's knowledge, previous opinions rendered in this case have not been reported.

JURISDICTION

1. The order of the Court of Appeals of the State of New York, denying discretionary review was entered on December 19, 1991.

2. No rehearing was requested.

3. This Court has jursidiction to review the judgment or decree in question by writ of certiorari pursuant to 28 U.S.C. Section 1257 (a) and Rule 10.1 of the Rules of this Court.

STATUTES INVOLVED

A relevant statute in this case is 42 U.S.C. Section 12101 *et. seq.*

42 U.S.C. Section 12101(a) provides:

> "The Congress finds that -- discrimination against individuals with disabilities persists in such critical areas as employment"

42 U.S.C. Section 12112 (a) provides:

> "No covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment"

Another relevant statute in this case is Section 7511 of the Civil Practice Law and Rules of the State of New York.

Section 7511 provides:

> "An application to vacate or modify an award may be made by a party within ninety days after its delivery to him."

Section 7511 (b)(1) provides:

> "1. The award shall be vacated on the application of a party who either participated in the arbitration or was served with a notice of intention to arbitrate if the court finds that the rights of that party were prejudiced by:
>
> (i) corruption, fraud, or misconduct in procuring the award; or

(ii) partiality of an arbitrator appointed as a neutral, except where the award was by confession; or

(iii) an arbitrator, or agency or person making the award exceeded his power or so imperfectly executed it that a final and definite award upon the subject matter submitted was not made; or

(iv) failure to following the procedure of this article, unless the party applying to vacate the award continued with the arbitration with notice of the defect and without objection."

STATEMENT OF THE CASE

In a letter dated July 30, 1985, Al Mobilio, composing room General Foreman, Newsday, Inc., notified Frank Altamore, a Compositor (Handman) who is the Petitioner herein, that his employment with Newsday was being terminated effective July 31, 1985. In addition, Petitioner was advised that his group health insurance benefits was also being terminated. In support of its dismissal, Newsday stated that it "has been advised by Dr. Housman that you suffer from a permanent disability which precludes your return to employment at Newsday in your previous position." Newsday then continued "Your permanent disability warrants your discharge for cause under the collective bargaining agreement between Newsday and Long Island Typographical Union Local No. 915. Newsday has determined that your employment status will be terminated effective July 31, 1985. One effect of this termination notice is that Newsday will cease making contributions for your group health insurance effective August 1, 1985." Petitioner, it should be noted, was a long standing employee of Newsday with job guarantees. He had been employed by Newsday since on or about July 7, 1970.

In fact, petitioner's long standing employment gave him certain job security rights. These rights are contained in Section 3 of the Collective Bargaining Agreement between respondent and the Long Island Typographical Union Local 915, of which petitioner was a member.

This Section states in relevant part:

> "In consideration of the Union's agreement that the Publisher shall not be restricted with regard to the Introduction and operation of new equipment and processes for the composition of its newspaper and its acceptance of the retirement provision herein, the Publisher agrees that all regular situation holders whose priority date precedes June 10, 1972, (see list Appendix A) will be retained on situations for the remainder of their working life but no longer than the anniversary of his or her 70th date of birth, unless vacating same through retirement, resignation, death, or discharge for cause."

Respondent's determination was rooted in the fact that after seven (7) years of competent service, Petitioner was compelled to take a disability leave due to bacterioendocarditis, which is a blood infection. After several weeks of daily testing and treatment in Nassau Hospital, Petitioner developed a severe problem with his movement, balance and vision. This condition was ultimately diagnosed as severe vertigo. Although, Petitioner's condition periodically improved, he was beset with visual disturbances and headaches between 1977 and 1984. During this time, Petitioner remained on disability and did not work because ***Respondent refused to make allowances for light duty.***

Various doctors who treated Petitioner during this time, concluded that although Petitioner's condition was then disabling, it was not necessarily permanently disabling. However, in 1982 in an attempt to satisfy Respondent's threats, Petitioner supplied it with documentation as to his continuing disability. At that time, Petitioner forwarded a note from one Doctor Harkavy, who was Petitioner's internist. Dr. Harkavy stated with reference to Petitioner "He is totally disabled and cannot work at this time." In 1984, Petitioner supplied Respondent with another note from Dr. Harkavy. This one stated that Petitioner "is totally disabled at this time as a

result of severe constant vertigo." It should be noted that Dr. Harkavy did not render an assessment concerning Petitioner's prognosis as to permanency. Dr. Harkavy recommended that Petitioner visit neurologists Dickman, Mazurek & Marks. Petitioner visited this neurologist on September 12, 1985, May 8, 1986 and October 16, 1986. At no time however did Respondent ever seek to make allowances for Petitioner's condition. Dr. Marks testified at the January 22, 1987 hearing. He testified that Petitioner had made progress and was then able to return to work. Unfortunately, Arbitrator House disregarded this testimony prejudicing Petitioner.

Approximately nine (9) months later, Respondent threatened Petitioner to submit to a complete medical examination by a physician of Respondent's choice. Respondent knowingly that, "No Journeyman shall be required to submit to a physical examination as a condition of employment" under the Collective Bargaining Agreement used the examination wrongly. Respondent thereupon referred Petitioner to Dr. Housman. Dr. Housman concluded that Petitioner could not then engage in an occupation which required him to continously change his field of vision or the position of his head. One (1) week later, at Respondent's request, Dr. Housman supplemented his evaluation. At that time, he provided a note to Respondent which concluded that Petitioner was totally and permanently disabled to perform his duties. It was immediately thereafter that Respondent carried out its threats and furnished Petitioner with the termination notice dated July 30, 1985.

Petitioner and his Union, the Long Island Typographical Union Local No. 915 pursuant to the relevant collective bargaining agreement challenged Respondent who failed to reply. The matter of Petitioner's dismissal was then submitted to arbitration. Pursuant to this request, an arbitration hearing was held before Daniel House, Arbitrator, on May 20, July 29, September 3, September 4, September 30, October 8, October 29, November 5, November 24, December 4, 1986 and January 21 and 22, 1987.

At the outset of the hearing, the parties could not agree upon a stipulated issue. Therefore, the arbitrator ultimately stated that the issue was "Did the Employer violate the Agreement between the parties by unfairly discharging Frank Altamore? If so, what shall be the remedy?"

During the course of the arbitration hearing, at which Petitioner was represented by his own attorney, he alleged that under the relevant provisions of the collective bargaining agreement, an employee such as he, who was protected by job security rights, could not be dismissed because of a medical disability, whether permanent or not. In this vein, petitioner asserted that the medical disability was not one of the causes for which an employee with job security rights could be dismissed under Section 3 of the Collective Bargaining Agreement. Petitioner also argued during the hearing that, in any case, the medical evidence did not support a conclusion that he was permanently disabled. Petitioner also argued that he was a victim of discrimination. Respondent, on the other hand, essentially argued that, in its opinion, Petitioner's disability constituted "neglect of duty" which, under the collective bargaining agreement, it argued gave it the right to dismiss. It should be noted that Respondent's argument represented a departure from its original justification in which it argued that Petitioner was guilty of "incompetence." It should also be noted that there was nothing in the applicable provisions to support Respondent's position that Petitioner's disability constituted "neglect of duty". Respondent and the arbitrator departed from traditional past practices and usages defining "neglect of duty" in order to discriminate against Petitioner. There was also no contractual evidence in support of Respondent's position concerning a prior arbitration involving the parties, the Harry Beal case. In fact, this Decision conflicts with Arbitrator House's award because it protects priority status.

In an award dated April 24, 1987, Arbitrator House ruled "The Employer did not violate the Agreement between the parties by unfairly discharging Frank Altamore." In so concluding, Arbitrator House held "I find from the foregoing that it was proved that the 'non-disciplinary' discharge of Frank Altamore (sic) did not violate the Agreement and was fair: 'neglect of duty' includes being unable to report for and perform any of the normal work which might be available for assignment, even if the disability to do so is not the fault of the grievant." The arbitrator therefore subjected Petitioner to a "no win" situtation. He even omitted actual facts and replaced them with non-factual, self-serving assertions merely to support his determination for Respondent. Arbitrator House prior to the start of one hearing told Respondent to challenge the record because it was damaging their case.

Believing that he was aggrieved, Petitioner, commenced a proceeding, in his own name, pursuant to Article 75 of the Civil Practice Law and Rules of the State of New York, to vacate Arbitrator House's award.

In a memorandum decision dated October 16, 1987, the Honorable Angelo D. Roncallo, Justice of the Supreme Court of the State of New York, dismissed the Petition (A-5). In doing so, Justice Roncallo held that Petitioner "was not a formal party" to the arbitration. As such, Justice Roncallo held that Petitioner did not have standing to maintain this proceeding. Justice Roncallo also held that the Court could not review errors of fact or law made by an arbitrator and render a "decision de novo on the merits". Finally, Justice Roncallo held that Petitioner's arguments were not within the parameters set forth in CPLR Section 7511 (b). This memorandum decision was followed by an Order and Judgement by Justice Roncallo dated November 12, 1987 (A-7).

Petitioner then appealed to the Appellate Division of the Supreme Court of the State of New York, Second Department which transferred the matter to the Appellate Division, Fourth Department. In his appeal, petitioner argued that (1) the lower court erred in determining that he did not have standing to maintain this proceeding; (2) the arbitrator exceeded his authority in rendering the award herein in that it did not draw its essence from the collective bargaining agreement; (3) the award violated the public policy of the United States and the State of New York so as to render it subject to vacatur; and (4) the arbitrator exceeded his authority in rendering the award in that he ignored precedent, custom and practice.

In a Decision dated July 12, 1991, the Appellate Division, Fourth Department unanimously affirmed the lower court's determination (A-3). However, in doing so, the Court held that the "Supreme Court erred in finding that petitioner lacked standing to challenge the arbitrator's award." However, the Court continued "Nonetheless, we conclude that the arbitrator's determination that petitioner was lawfully discharged was not irrational, in excess of his authority or violative or any public policy. Accordingly, it should not be disturbed (citations omitted.)"

In a Notice of Motion dated July 29, 1991, Petitioner moved the Appellate Division, Fourth Department for leave to Appeal to the Court of Appeals of the State of New York. In a Decision and Order dated Ocober 4, 1991 (A-2), the Fourth Department denied Petitioner's motion for leave to Appeal.

In a Notice of Motion dated October 28, 1991, petitioner moved the Court of Appeals of the State of New York for leave to appeal to it. In an Order dated December 19, 1991 (A-1), the Court of Appeals of the State of New York denied petitioner's application for discretionary review. This constituted an exhaustion of petitioner's State judicial remedies. Petitioner now files a Petition for a Writ of Certiorari.

The federal questions raised in this petition were presented to the court of first instance and were rejected by it as was already noted. The issues were repeated at each Appellate level but were similarly rejected. The pertinent quotations of the State courts which confirm that the issues were raised has already been noted.

ARGUMENT

Petitioner respectfully submits that the following discussion will reveal that this Petition should be granted because the State Courts' failure to vacate the arbitration award in issue, on the ground that it is violative of public policy, a federal question, conflicts with decisions of the United States Court of Appeals. In addition, the State Courts' failure to vacate the arbitration award in issue, on the ground that it is violative of public policy, a federal question, conflicts with applicable decisions of this Court and established Federal policy. Finally, the State Courts' failure to vacate the arbitration award in issue, on the ground that the arbitrator exceeded his authority, conflicts with applicable decisions of this Court.

1. It is well established that a court has the power and, indeed, the duty to vacate an arbitrator's decision which violates established public policy. *United Paperworkers Int'l Union v. Misco, Inc.*, 484 U.S. 29 (1987); *W.R. Grace & Co. v. Int'l Union of United Rubber Workers, Local 759*, 461 U.S. 757 (1983). The *Misco* Court, in fact, held that a court may refuse to enforce an award wherein the award

would violate some "explicit public policy" that is "well defined and dominant.....ascertained by reference to the laws and legal precedents..." *Id.* at 43, *quoting W.R. Grace*, 461 U.S. at 766.

Petitioner submits that there is a well-defined public policy against discrimination based upon handicapped in the workplace, based on federal law, administrative guidelines, and legal precedents. The arbitrator's decision affirming the respondent's actions in the circumstances present in this case, violates that policy and therefore should be vacated. The arbitrator's decision and the State Courts' ratification of it is in total conflict with the clearly defined federal public policy, as evidenced in statute, regulation, and in decisions of this Court and the United States Court of Appeals which seek to protect disabled persons from discrimination in the workplace. These statutes, regulations and decisions must supersede the arbitration award being contested herein.

In fact, the United States Court of Appeals for the Second Circuit, in a case involving the same parties as herein, recently recognized a Court's authority to vacate an arbitration award on public policy grounds. In *Newsday Inc. v. Long Island Typographical Union No. 915, CWA, AFL-CIO*, 915 F 2d 840 (2nd Cir. 1990), the Second Circuit affirmed the Decision of the District Court which had reversed an arbitration award reinstating an employee. In this case, the Court held "A court may refuse to enforce an arbitrator's award under a collective bargaining agreement if the award is contrary to public policy." The same result must ensue herein.

Petitioner asserts that an application of these principles to the fact and circumstances of this proceeding clearly established that his dismissal not occur. We will remember that petitioner was dismissed because of a disability and was denied a light duty assignment which other employees had been afforded. The arbitrator held that this disability constituted "neglect of duty", although petitioner had been on the job security list. Petitioner respectfully submits that this award is directly contrary to statute and regulation and is therefore violative of the federal public policy as evidenced in statute, regulation and prior decision. This is an issue of public importance and the ends of justice. As such, the review of this Court is appropriate.

A strong federal policy against discrimination of the disabled in the workplace is deeply rooted in Federal law. There are several Federal statutes which confirm this policy.

The Rehabilitation Act of 1973, 29 U.S.C. Section 701 *et. seq.* is one. 29 U.S.C. Section 794 provides in relevant part:

> "No otherwise qualified individual with handicaps in the United States, as defined in Section 706 (8) of this title, shall solely by reason of her or his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by an Executive agency or by the United States Postal Service."

This policy was expanded upon in the Americans with Disabilities Act of 1990, 42 U.S.C. Section 12101 *et. seq.*

Section 12101 (a) provides:

> "The Congress finds that -- discrimination against individuals with disabilities persists in such critical areas as employment"

42 U.S.C. Section 12112 (a) provides:

> "No covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment"

29 C.F.R. Section 1615.101 *et. seq.* also expresses this clearly defined public policy protecting the rights of the disabled in the workplace.

This argument becomes even more glaring when one realizes that during the arbitration it was revealed that other disabled employees

were not dismissed by respondent. Thus, petitioner was even a more blatant victim of unlawful discrimination because of his age and disability.

In fact, Respondent has a long history of not dismissing disabled employees, whether permanently disabled or not. For example, an employee Czeslaw Muszynski enjoyed the benefits of the same collective bargaining agreement. Mr. Muszynski, although disabled, continues to enjoy all benefits although considered "inactive". Other employees including Edward Willet, Harry Beal, Harry O'Neil and Karen Krawchuk, are all disabled employees who continue to enjoy full benefits while in an inactive status. Other individuals who in the past received such consideration were Chester Brown, William Chapman, Salvatore Laurice and Albert Mobilio.

Obviously, Respondent met its public policy obligation to these people. Petitioner is entitled to the same treatment. ***He is the only one who did not receive it.*** Instead, Respondent from day one continously targeted Petitioner with threatening conduct. No other employee had to endure such threats. For example, as we have seen, Respondent made no allowance for light duty and instead of requesting information from Petitioner, continually threatened him with discharge. Ultimately, Respondent dismissed petitioner, despite his presence on the job security list. The record established that disabled employees, whether permanent or temporary were not discharged. Only petitioner was discharged because of discrimination by respondent and the arbitrator.

The requirement that an employee be able to show that he was otherwise qualified was met in this case. Not only were other disabled job guaranteed employees permitted to retain their security rights under similar circumstances; but petitioner's mere placement on the job security list insured that a physical disability would not render him unqualified. Again, it must be emphasized, that no other employee has been treated in the manner in which Petitioner was treated.

Thus, the fact that the arbitrator and the State Courts condoned petitioner's dismissal was in violation of clearly defined public policy protecting the rights of disabled in the workplace, as

established by Federal statute, regulation and decision. The result was that the State Court decisions conflicted with decisions of United States Court of Appeals and of this Court concerning the ability to vacate an award based upon public policy grounds and conflicted with the strong national policy against discrimination of the disabled in the workplace. The result was that the State Courts' decisions compelled the commission of an unlawful act; to wit: the discharge of an individual because of a disability.

2. It has long been held that an award may be vacated where the Arbitrator has exceeded his/her authority. Perhaps the leading case on this point is *United Steelworkers of America v. Enterprise Wheel and Car Corp.*, 363 U.S. 593, 597 (1960). There the Court held:

> "(A)n arbitrator is confined to interpretation and application of the collective bargaining agreement; he does not sit to dispense his own brand of industrial justice. He may of course look for guidance from many sources, yet his award is legitimate only so long as it draws its essence from the collective bargaining agreement. When the arbitrator's awards manifest an infidelity to this obligation, courts have no choice but to refuse enforcement of the award."

In other words, an arbitrator may not impose a remedy which directly contradicts the express language of the collective bargaining agreement.[2] Arbitrators may not ignore the requirements of the collective bargaining agreement in order to "dispense their own brand of industrial justice." Where, as here, an arbitrator attempts to do so, it is appropriate for the court to vacate an award.

The Circuit courts have uniformly approved vacatur of awards that exceed that authority conferred upon the arbitrator by the contract, or that do not draw their essence from the collective bargaining agreement, or that are not supported by the record evidence. *Office and Professional Employees International Union, Local 2 v. Washington Metropolitan Area Transit Authority*, 724 F. 2d 133 (D.C. Cir. 1983); *Butterkrust Bakeries v. Bakery Conf. & Tobacco Workers.*, 726 F. 2d 698 (11th Cir. 1984); *Detroit Coil Co. v. IAM*,

594 F. 2d 575 (6th Cir. 1979), *cert. denied; Monogahela Power Co. v. Local 2332, IBEW*, 566 F. 2d *1966* (4th Cir. 1976); *Torrington Co. v. Metal Products Workers Union Local 1645;* 362 F. 2d 677 (2d Cir. 1966); *Truck Drivers & Helpers Union Local 784 v. Ulry-Talbert Co.*, 330 F. 2d 562 (8th Cir. 1964). Similar result should follow in the instant matter.

These cases tell us that the State Courts' decisions in the instant matter concerned the decision of a federal question in a way that conflicts with applicable decisions of this Court and of the United States Courts of Appeal.

In conducting an analysis of this issue, we must consider the interrelationship between the collective bargaining agreement and the General Laws of the International Typographical Union. We shall first consider the relevant provisions of the collective bargaining agreement.

As we have seen, Section 3 of the collective bargaining agreement between Respondent and the Long Island Typographical Union relates to job security. It states in relevant part that Newsday:

> "agrees that all regular situation holders whose priority date precedes June 10, 1972 ...will be retained on situations for the remainder of their working life but no longer than the anniversary of his or her 70th date of birth, unless vacating same through retirement, resignation, death or discharge for cause."

Since Petitioner commenced his employment prior to June 10, 1972, he falls within the parameters of this job security clause. Thus, Respondent, under the circumstances of this case, could only discharge Petitioner if his disability constituted "neglect of duty" and if "neglect of duty" constitutes sufficient "cause".

Section 13 of the collective bargaining agreement states that the foreman shall have the right to discharge for "neglect of duty". Article II, Section 3 of the aforesaid General Laws also states that the foreman may discharge an employee for "neglect of duty".

However, neither these sections nor any other provision of the collective bargaining agreement and the General Laws define "neglect of duty". We must then look deeper in order to determine what if any authority is rooted in either the collective bargaining agreement or the General Laws or the past practice and usage to address the arbitrator's determination.

The answer is found in the General Laws. Firstly, it should be noted that the General Laws, which are nationally consistent within the industry, are totally applicable to the collective bargaining agreement and, in fact, should be considered a part thereof. Section 8 of the collective bargaining agreement states: "It is understood and agreed that the General Laws of the International Typographical Union, in effect at time of signing of the Agreement...which are not in conflict with law or with the Agreement, shall govern relations between the parties on conditions and matters not specifically covered herein."

Although, nothing defines "neglect of duty", Article V, Section 6 of the General Laws states that employees "incapacitated by illness, shall not suffer loss of situation or priority standing while so employed or incapacitated....". This provision does not distinguish between a temporary disability and a permanent disability.

This paragraph and past practice and usage which is deeply enrooted and which is consistent with the basic premise that "neglect of duty" can only occur through affirmative conduct or active employment. A non-disciplinary reason such as a disability cannot constitute "neglect of duty".

Thus, because, as we have seen, there is no definition of "neglect of duty" or any provision authorizing dismissal of an employee under a disability, whether permanent or temporary, Article V, Section 6 must control with the underlining past practices and usage. As such, Petitioner, being disabled, could not have been properly dismissed.

Therefore, petitioner asserted that the arbitrator in determining that Petitioner should be dismissed rewrote the agreement that

Respondent and the Union had agreed to. Under these circumstances, the arbitrator exceeded his authority and executed the award in an imperfect fashion discriminating against Petitioner.

In summary, the foregoing discussion has revealed that this Petition should be granted because the State Courts' failure to vacate the arbitration award in issue, on the ground that it is violative of public policy, a federal question, conflicts with decisions of the United States Court of Appeals. In addition, the State Courts' failure to vacate the arbitration award in issue, on the ground that it is violative of public policy, a federal question, conflicts with applicable decisions of this Court and established Federal policy. Finally, the State Courts' failure to vacate the arbitration award in issue, on the ground that the arbitrator exceeded his authority, conflicts with applicable decisions of this Court.

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests that this court grant this Petition for a Writ of Certiorari.

Respectfully submitted,

LECCI, WOLIN & WOLIN, ESQS.
Attorneys for Petitioner
183 Broadway - Suite 316
Hicksville, N.Y. 11801
(516) 938-0030

By: ALAN E. WOLIN, ESQ.

APPENDIX

STATE OF NEW YORK,
COURT OF APPEALS

At a session of the court, held at Court of Appeals Hall in the City of Albany on the nineteenth day of December A.D. 1991

Present, Hon. Sol Wachtler, *Chief Judge, presiding.*

4-10 Mo. No. 1257
In the Matter of Frank Altamore,

Appellant,

v.

Newsday, Inc.,

Respondent.

A motion for leave to appeal to the Court of Appeals in the above cause having heretofore been made upon the part of the appellant herein and papers having been submitted thereon and due deliberation having been thereupon had, it is

ORDERED, that the said motion be and the same hereby is denied with one hundred dollars costs and necessary reproduction disbursements.

Donald M. Sheraw
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

APPELLATE DIVISION, FOURTH JUDICIAL DEPARTMENT

Motion No. 763/91

PRESENT: DENMAN, J.P., GREEN, BALIO, DAVIS, JJ.

MATTER OF FRANK ALTAMORE, APPELLANT,

V.

NEWSDAY, INC., RESPONDENT.

The above-named appellant having moved for reargument or in the alternative, leave to appeal to the Court of Appeals from the order of this Court entered July 12, 1991, and respondent having cross-moved for certain relief,

Now, upon reading and filing the affidavit and affirmation of Alan E. Wolin sworn to and dated July 30, 1991 and August 29, 1991, the notice of motion with proof of service thereof, the opposing affidavit and affirmation of Amber Kagen sworn to and dated August 21, 1991 and September 3, 1991, the notice of cross motion with proof of service thereof, and due deliberation having been had thereon,

It is hereby ORDERED That, the motion be, and the same hereby is denied, and

It is further ORDERED That, the cross motion be, and the same hereby is denied.

Entered: October 4, 1991 CARL M. DARNALL, Clerk

SUPREME COURT OF THE STATE OF NEW YORK

APPELLATE DIVISION, FOURTH JUDICIAL DEPARTMENT

Motion No. 763/91

PRESENT: DENMAN, J.P., GREEN, BALIO, LOWERY, DAVIS, JJ.

MATTER OF FRANK ALTAMORE, APPELLANT,

V.

NEWSDAY, INC., RESPONDENT.

The above-named Frank Altamore having appealed to this court from the judgment of the Supreme Court, entered in the Nassau County Clerk's office on November 12, 1987, and said appeal having been submitted by Alan Wolin of counsel for appellant, Bradford Coupe of counsel for respondent, and due deliberation having been had thereon,

It is hereby ORDERED, That the judgment so appealed from be the same hereby is unanimously afffirmed.

Memorandum, which is hereby made a part hereof.

Entered: July 12, 1991 CARL M. DARNALL, Clerk

763. (Nassau Co.) -- MATTER OF FRANK ALTAMORE, APPELLANT V. NEWSDAY, INC., RESPONDENT. -- Judgment unanimously affirmed without costs. Memorandum: Supreme Court erred in finding that petitioner lacked standing to challenge the arbitrator's award (*see*, Matter of Diaz v. Pilgrim State Psychiatric Center of State of N.Y., 62 NY2d 693, 695). Nonetheless, we conclude that the arbitrator's determination that petitioner was lawfully discharged was not irrational, in excess of his authority or violative of any public policy. Accordingly, it should not be disturbed (*see*, Matter of Albany County Sheriff's Local 775 of Council 82, AFCSME, AFL-CIO (County of Albany), 63 NY2d 654, 656; Matter of Local Div. 1179, Amalgamated Tr. Union, AFL-CIO (Green Bus Lines), 50 NY2d 1007, 1009; Rochester City School Dist. v. Rochester Teachers Assn., 41 NY2d 578, 582-583; Matter of Board of Education of Dover Union Free School Dist. v. Dover-Wingdale Teachers' Assn., 95 AD2d 497, 501-502, *affd* 61 NY2d 913).

We have reviewed the other issues raised by petitioner and find them to be without merit. (Appeal from Judgment of Supreme Court, Nassau County, Roncallo, J. - Arbitration.) PRESENT: DENMAN, J.P., GREEN, BALIO, LOWERY, DAVIS, JJ.

MEMORANDUM

SUPREME COURT. NASSAU COUNTY

In the Matter of the Application of FRANK ALTAMORE,

Petitioner,

For a Judgment Pursuant to Article 75 of the Civil Practice Law and Rules,

- against -

NEWSDAY, INC.,

Respondent.

IAS, PART IX (10/9/87)

BY ANGELO D. RONCALLO

DATED OCTOBER 16, 1987
INDEX #13787/1987

JACK B. SOLERWITZ
Attorney for Petitioner
170 Old Country Road
Mineola, N.Y. 11501

MORGAN, LEWIS & BOCKIUS
Attorney for Respondent
101 Park Avenue
New York, N.Y. 10178

Petitioner initiates this proceeding pursuant to Article 75 of the CPLR seeking to vacate the opinion and award of the arbitrator, which upheld the dismissal of Petitioner from his inactive employment with respondent, NEWSDAY, INC. The petition is dismissed accordingly.

The arbitration proceeding leading to the award was brought by L.I. Typographical Union Local 915 pursuant to a collective bargaining agreement between Newsday and the Union.

Petitioner was the grievant in said proceeding; he was not a formal party; Newsday and the Union were the only parties to the contract on which the arbitration was predicated.

An arbitration award rendered pursuant to such an agreement may be vacated only at the instance of one of those two parties

(Matter of Soto (Goldman), 7 NY 2d 397; *Chupka* v. *Lorenz-Schneider Co., Inc.*, 12 NY 2d 1).

This Court has no authority to review errors of fact or law made by an arbitrator, and render a decision de novo on the merits *(Integrated Sales, Inc.* v. *Maxell Corporation of America*, 94 AD 2d 221; *W.M. Girvan, Inc.* v. *Robilotto*, 40 AD 2d 1060; *Matter of Raisler Corporation*, 32 NY 2d 274).

CPLR 7511 (b) sets forth the grounds for vacating an award when the application is made by a party who participated in the arbitration. Four grounds are enumerated: (1) corruption, fraud or misconduct in procuring the award, (2) partiality of the arbitrator, (3) the arbitrator exceeded his power or imperfectly executed it, and (4) failure to follow the procedures specified in Article 75 *(Matter of Torano and Motor Vehicle Accident Indemnification Corporation*, 19 AD 2d 356; *Matter of Board of Education* v. *Dover-Wingdale Teachers' Assocaiton*, 95 AD 2d 497; *Matter of Pierre and General Accident Insurance*, 100 AD 2d 705; Matter of Raisler Corporation, supra).

Settle judgment on notice.

J.S.C.

At an IAS Part of the Supreme Court of the State of New York, held in and for the County of Nassau, at the Courthouse located at 100 Supreme Court Drive, Mineola, New York on the 12th day of November, 1987

PRESENT: Hon. Angelo D. Roncallo

In the Matter of the Application of FRANK ALTAMORE,

Petitioner,

For a Judgment Pursuant to Article 75 of the Civil Practice Law and Rules,

- against -

NEWSDAY, INC.,

Respondent.

Index No. 13787/1987

ORDER AND JUDGMENT

Petitioner Frank Altamore ("Petitioner") by his attorneys, Jack B. Solerwitz, having moved by Order to Show Cause dated July 21, 1987 for an Order pursuant to Article 75 of the Civil Practice Law and Rules vacating the opinion and award of Arbitrator Daniel House which upheld the dismissal of petitioner from his inactive employment with Respondent Newsday, Inc. ("Newsday") and Newsday having filed the affidavit of James D. Madigan III and Memorandum of Law in Opposition to the Petition seeking dismissal of the petition;

NOW, upon reading and filing the Petition dated July 21, 1987 with exhibits annexed thereto, and the affidavit of James D. Madigan III, sworn to on October 6, 1987 with exhibits annexed thereto, and the Memorandum of Law in Opposition to the Petition, all in opposition to Petitioner's motion; and due deliberation having been had thereon, and the Court having duly made its decision on October 16, 1987;

NOW, it is

ORDERED AND ADJUDGED, that Newsday's application for dismissal of the petition is hereby granted in all respects and judgment is hereby awarded in favor of Newsday and against petitioner dismissing the petition on the merits with prejudice.

_____

J.S.C.

Addresses of the Parties

Newsday, Inc.
235 Pine Lawn Road
Melville, N.Y. 11747

Frank Altamore
38 Vincent Place
Lynbrook, N.Y. 11563

STATE OF NEW YORK)
COUNTY OF NASSAU) SS:

Jill Ann Mackie being duly sworn, deposes and says:

Deponent is not a party to the action, is over the age of 18 years and resides at Massapequa, New York.

That on the 13th day of March ,1990, deponent served the within Order and Judgment with Notice of Entry

Upon: Morgan Lewis & Bockius
101 Park Avenue
New York, N.Y. 10178

The address designated by said attorney(s) for that purpose by depositing a true copy of same enclosed in a post-paid properly addressed wrapper in an official depository under the exclusive care and custody of the United States Postal Service with the State of New York.

Jill Ann Mackie

Sworn to before me this
13th day of March, 1990.

Alan E. Wolin

NOTARY PUBLIC

(2)

No. 91-1498

Supreme Court, U.S.
FILED
APR 15 1992
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

FRANK ALTAMORE,

Petitioner,

vs.

NEWSDAY, INC.,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE NEW YORK SUPREME COURT
APPELLATE DIVISION – FOURTH DEPARTMENT

BRIEF FOR RESPONDENT NEWSDAY, INC. IN OPPOSITION

BRADFORD W. COUPE
(Counsel of Record)
AMBER KAGAN
MORGAN, LEWIS & BOCKIUS
Attorneys for Newsday, Inc.
101 Park Avenue
New York, New York 10178
(212) 309-6194

Date: April 14, 1992

QUESTIONS PRESENTED

1. Whether Petitioner, the grievant in an arbitration proceeding who was not a party to the collective bargaining agreement or the arbitration, has standing to bring this action challenging the arbitrator's adverse award?

2. Whether the award of the arbitrator upholding Petitioner's discharge conflicts with a dominant and well-defined public policy against disability discrimination in the workplace?

3. Whether the arbitrator exceeded his authority under the collective bargaining agreement in upholding the discharge of the Petitioner?

PARTIES TO THE PROCEEDINGS

A. The parties to the proceedings below all appear in the caption to this case.

B. Pursuant to this Court's Rule 29.1, Newsday, Inc. provides the following statement of parent companies and subsidiaries except for wholly-owned subsidiaries:

> Newsday, Inc. is a wholly-owned subsidiary of the Times Mirror Corporation. Newsday does not have any non wholly-owned subsidiaries.

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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

No. 91-1498

FRANK ALTAMORE,

Petitioner,

v.

NEWSDAY, INC.,

Respondent.

On Petition For Writ Of Certiorari To
The New York Supreme Court
Appellate Division - Fourth Department

BRIEF FOR RESPONDENT NEWSDAY, INC. IN OPPOSITION

Respondent Newsday, Inc. ("Newsday" or "Respondent") respectfully requests that the Petition for Writ of Certiorari of Petitioner, Frank Altamore (the "Petitioner"), to review the judgment of the New York Supreme Court Appellate Division - Fourth Department be denied.

OPINIONS BELOW

The opinions of the New York State Supreme Court, Nassau County ("New York Supreme Court") and the New York Supreme Court Appellate Division, Fourth Department ("Appellate Division"), which are reprinted in the Petitioner's Appendix, are not reported. The Appellate Division's Order denying Petitioner's Motion for Leave to Appeal to the New York Court of Appeals is available on Lexis at 1991 N.Y. App. Div. Lexis 14039 (4th Dep't. 1991). The New York Court of Appeal's Order denying Petitioner's Motion for Leave to Appeal is reported at 79 N.Y.2d 751 (1991).

JURISDICTION

Petitioner invokes the federal question jurisdiction of this Court under 28 U.S.C. § 1257(a) which states: "[f]inal judgments or decrees rendered by the highest court of a State in which a decision may be had, may be reviewed by the Supreme Court by writ of certiorari . . . where any title, right, privilege, or immunity is specially set up or claimed under the . . . statutes of . . . the United States." Pursuant to this provision and Rule 14.1(h) of the Rules of this Court, Petitioner must raise a timely and proper federal question in the State Court proceedings as a prerequisite to

seeking this Court's review. See Webb v. Webb, 451 U.S. 493 (1981) (this Court is without jurisdiction to hear a federal question that was not properly raised in the state proceedings); Board of Directors of Rotary Int'l v. Rotary Club of Duarte, 481 U.S. 537 (1987) (it is well settled that this Court will not review a final judgment of a state court unless the federal claim was adequately presented in the state system); Bankers Life & Casualty Co. v. Crenshaw, 486 U.S. 71 (1988) (same).

Contrary to Petitioner's assertion, he failed to properly present a federal question in the state proceedings. Although Petitioner could have moved to vacate the arbitrator's award

under § 301 of the Labor-Management Relations Act, thereby creating a federal issue, he did not do so.[1/] Rather, Petitioner moved to vacate the award only under Section 7511 of the New York Civil Practice Laws and Rules ("CPLR"). The State Courts decided the vacatur issues under that statute and applicable state court precedent, and nowhere addressed or purported to apply federal law. Accordingly, this Court should dismiss this petition for a writ of certiorari for Petitioner's failure to properly invoke this Court's federal question jurisdiction. See Webb, 451

1/ Indeed, Petitioner has failed to cite Section 301 in his Petition before this Court as the relevant federal statute, as is required under this Court's Rule 14.1(f).

U.S. at 495 (when the highest state court fails to pass upon a federal question, it is assumed that the issue was not properly presented in the state courts); Rotary Club of Durante, 481 U.S. at 550; Bankers Life & Casualty Co., 486 U.S. at 72.

STATUTES AND REGULATIONS INVOLVED

The relevant portions of the following statutes are set forth in the Appendix hereto:

Section 301 of the Labor-Management Relations Act,
29 U.S.C. § 185;

The Americans with Disabilities Act of 1990,
42 U.S.C. § 12101 et. seq.;

The Rehabilitation Act of 1973,
29 U.S.C. § 701 et. seq.;

The New York Human Rights Law, N.Y. Exec. Law § 296 et. seq.; and

Section 7511 of the New York Civil Practice Laws and Rules.

STATEMENT OF THE CASE

A. Statement of the Facts

Respondent and the Long Island Typographical Union No. 915 are parties to a collective bargaining agreement covering Newsday's Composing Room employees. In 1972, Newsday hired Petitioner to work as a printer in its Composing Room, where he was actively employed until April of 1977. In that month, he became afflicted with a seriously disabling condition that

forced him to stop work and to take a leave of absence.

Petitioner was diagnosed, by his own physicians, to be "totally disabled". (R. 19).[2/] On August 29, 1984, Respondent wrote to Petitioner noting that more than two years had passed since its last correspondence with him on July 19, 1982, at which time Petitioner had stated that he expected to return to work in the near future. Newsday told Petitioner that it might be forced to terminate his employment unless he agreed to submit to a complete physical examination by an independent physician. (R. 21).

2/ References to the record on appeal to the Appellate Division will be cited in this fashion.

Petitioner responded to Newsday by submitting a letter from his neurologist again stating that Petitioner was "totally disabled." (R. 21). Thereafter, Petitioner agreed to be examined by an independent neurologist recommended by Newsday's medical consultant. (R. 21). This neurologist, Dr. Ronald Houseman, diagnosed Petitioner as being permanently and totally disabled. (R. 22). In light of this diagnosis, Newsday terminated Petitioner's inactive employment on July 31, 1985. At that point, Petitioner had been on disability leave continuously for a period of eight years and three months.

The Union filed a grievance on Petitioner's behalf challenging the

termination of his employment and, under the collective bargaining agreement between Newsday and the Union, pursued his grievance through arbitration.

Arbitrator Daniel House was chosen by the Union and Newsday to hear and decide the dispute. After twelve days of hearing, Arbitrator House concluded that up to the time of Petitioner's discharge, neither his own doctor nor an independent neurological specialist "reported finding anything other than that [Petitioner] was permanently and totally disabled . . . ." (R. 19). Moreover, Arbitrator House noted that subsequent to his termination, the Petitioner's own physician, Dr. Morris

Dickman, had confirmed Dr. Houseman's diagnosis. (R. 22). The Arbitrator held that Newsday did not violate the collective bargaining agreement by terminating Petitioner's inactive employment because under the parties' agreement, "'neglect of duty' includes being unable to report for and perform any of the normal work which might be available for assignment, even if the disability to do so is not the fault of the [Petitioner]." (R. 23).[3/]

3/ In his Petition for Writ of Certiorari, Petitioner fails to provide references to the record in support of his recitation of the facts. In several instances, Petitioner recites "facts," such as evidence concerning other employees' disabilities, that are not contained in the record of the State Court proceedings or of the

(continued...)

B. The Proceedings Below

On July 21, 1987, Petitioner commenced this action in the New York State Supreme Court of Nassau County to set aside Arbitrator House's arbitration award under the New York Civil Practice Laws and Rules Section ("CPLR") 7511. Petitioner did not raise his public policy argument at that time.

On October 16, 1987, the Honorable Angelo D. Roncallo dismissed Petitioner's motion to vacate the award. Justice Roncallo held that "Petitioner

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3/(...continued)
arbitration and which, therefore, should not be considered.

was the grievant in [the arbitration] proceeding; he was not a formal party; Newsday and the Union were the only parties to the [collective bargaining] contract on which the arbitration was predicated. An arbitration award pursuant to such an agreement may be vacated only at the instance of one of those two parties." Petition at A-5. Additionally, Justice Roncallo held that the court had "no authority to review errors of fact or law made by an Arbitrator, and render a decision de novo on the merits." Finally, he concluded that Petitioner's motion did not fall within one of the limited grounds for vacatur set forth in CPLR 7511. Thereafter, Petitioner moved to reargue

Justice Roncallo's order, which motion was denied on December 15, 1987. Petition at A-5.

On March 15, 1990, after unsuccessfully attempting to appeal the denial of his motion to reargue for over two years, Petitioner filed a Notice of Appeal to the New York Supreme Court Appellate Division, Second Department.[4/] In this appeal, Petitioner raised his public policy argument for the first time. On July 12, 1991, the Appellate Division issued a Decision and Order unanimously affirming the lower court's decision on

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4/ In May 1991, the appeal was transferred to the New York Supreme Court Appellate Division, Fourth Department.

the basis that Arbitrator House's award was not irrational, in excess of his authority or in violation of any public policy. Petition at A-4. However, in its memorandum decision, the Appellate Division held that the Petitioner did have standing to challenge the arbitration award. Petition at A-4.

On July 30, 1992, Petitioner moved in the Appellate Division for leave to appeal to the New York State Court of Appeals, which motion was denied on October 4, 1991. Thereafter, on October 30, 1991, Petitioner moved in the New York Court of Appeals for leave to appeal. This motion was denied on December 19, 1991.

REASONS FOR DENYING THE WRIT

This matter does not raise issues appropriate for the exercise of this Court's discretionary review by certiorari. In that regard, the Appellate Division's decision does not present an important question of federal law yet to be decided by this Court. Moreover, except for the Appellate Division's erroneous conclusion that Petitioner has standing to challenge the arbitrator's award, which would, if reversed, require Petitioner's Writ to be denied, the decision does not conflict with any decision of this Court or with opinions of the United States Courts of Appeals. Rather, the Appellate

Division's decision presents a fact-specific application of settled principles of law. Petitioner is not questioning the legal principles applied by the State Courts, but is seeking in this Petition, as he did in the state proceedings, to reargue the factual findings of Arbitrator House. Thus, there are no grounds that warrant granting the instant Petition.

A. The Petitioner Was Not A Formal Party To The Collective Bargaining Agreement Or The Arbitration Proceeding And, Consequently, Has No Standing To Bring This Petition.

It is well established that when a union and an employer are parties to a collective bargaining agreement which

contains a grievance procedure that gives the union the exclusive right to pursue claims on behalf of aggrieved employees, an individual grievant lacks standing to vacate an arbitration award rendered pursuant to that agreement. Indeed, the Circuit Courts have consistently refused to permit employees whose employment is governed by such agreements to independently attack adverse arbitration awards, unless such employees have also claimed that their union breached its duty of fair representation. See Martin v. Youngstown Sheet & Tube Co., 911 F.2d 1239 (7th Cir. 1990); Bacashihua v. U.S. Postal Service, 859 F.2d 402 (6th Cir. 1988); McNair v. U.S. Postal Service, 768 F.2d

730 (5th Cir. 1985); Vosch v. Werner Continental, Inc., 734 F.2d 149 (3d Cir. 1984), cert. denied, 469 U.S. 1108 (1985); Andrus v. Convoy Co., 480 F.2d 604 (9th Cir.), cert. denied, 414 U.S. 989 (1973).[5/]

The New York Supreme Court, applying an analysis that is consistent with federal law, correctly held that Petitioner was not a party to the collective bargaining agreement or the arbitration proceeding and, therefore, had no standing to vacate the award. The Appellate Decision, relying upon a

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5/ In the instant case, the Petitioner has not and cannot claim that the union breached its duty of fair representation under Section 301 of the Labor-Management Relations Act.

single decision in which both the union and individual grievants had the right to pursue grievances under the collective bargaining agreement, reversed. See Diaz v. Pilgrim State Psychiatric Center, 62 N.Y.2d 693, 476 N.Y.S. 2d 525 (1984). The Diaz result is an exception only because the controlling contract language expressly conferred upon grievants the right that settled State Court precedent and the federal common law deny in traditional labor-management contractual settings. Since, in the collective bargaining agreement before the Court, the union has the exclusive right to pursue grievances on behalf of individual grievants, Diaz is inapposite and the

Appellate Division's holding on the standing issue is in direct conflict with the settled law. Thus, Petitioner has no standing to bring this Petition and it should be dismissed.

B. Arbitrator House's Award Upholding Petitioner's Discharge Does Not Conflict With Any Dominant And Well-Defined Public Policy

The Petitioner asserts that Arbitrator House's award violates a public policy against disability discrimination in the workplace and, therefore, that the award should have been vacated by the State Courts. In support of this argument, Petitioner relies upon the Americans with Disabilities Act of 1990 (the "ADA") and the Rehabilitation

Act of 1973 (the "Rehabilitation Act").[6/]

6/ The Petitioner raised his public policy argument for the first time in his appeal to the Appellate Division. At that time, Petitioner claimed that Arbitrator House's award was in violation of the New York Human Rights Law and, therefore, violative of the public policy of the state of New York. Almost as an afterthought, Petitioner "noted that the United States Congress has recently extended the protection afforded individuals under 42 U.S.C. Section 1981 et. seq. and Section 2000e et. seq. to the disabled. Petitioner need not go any further in discussing this issue." Petitioner's ambiguous reference to a Congressional action is not supported by citation nor is it clear that the measure to which he refers was or ever became law. Neither the ADA nor the Rehabilitation Act were cited at that time or at any time thereafter.

Under the two-pronged test announced by this Court in United Paper works Int'l Union v. Misco, 484 U.S. 29 (1987), an arbitrator's award may be vacated only if: (1) the public policy allegedly involved is well-defined and dominant, as ascertained by reference to laws and legal precedents; and (2) the award creates an "explicit conflict" with such policy. Misco, 484 U.S. at 43. In the instant case, Petitioner has failed to meet either prong of this analysis.

Petitioner cites two federal statutes and a part of the Code of Federal Regulations ("CFR") in support of the first prong of the Misco analysis, that a well-defined and dominant public

policy exists. However, these federal statutes and regulations were never raised by Petitioner in the state courts in support of his public policy arguments there and, in any event, they are not applicable to the instant case. First, the ADA, which was signed by President Bush in July 1990, was not effective at the time of Arbitrator House's award, at the time Petitioner moved to vacate the award in the New York State Supreme Court, or at that time Petitioner appealed the New York Supreme Court's decision to the Appellate Division. Indeed, the relevant Title of the ADA, Title I, which prohibits discrimination on the basis of disability in private employment, is

not effective until July 26, 1992. Thus, the ADA was not "law" at the relevant times and cannot be cited now as the source of a well-defined public policy in the instant case.

Second, the Rehabilitation Act, which prohibits discrimination on the basis of handicaps, only applies to recipients of federal grants, programs conducted by executive agencies, and the United States Postal Service. 29 U.S.C. § 794 (1973). Thus, the public policy against handicap discrimination, as ascertained by reference to the Rehabilitation Act, applies only to those specifically enumerated entities. Since Respondent does not fall into any of the covered categories, the Rehabil-

itation Act is inapplicable and, consequently, cannot serve as the manifestation of public policy in this case.7/

Even assuming that the ADA and the Rehabilitation Act were appropriate sources of public policy in the instant case, Petitioner has failed to establish that Arbitrator House's award creates an explicit conflict with those policies, as is required under the second prong of the Misco analysis. The ADA and the Rehabilitation Act

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7/ Similarly, the part of the C.F.R. cited by Petitioner prohibits handicap discrimination in programs or activities conducted by the Equal Employment Opportunity Commission. 29 C.F.R. § 1615.101 et. seq. Thus, this expression of public policy has no application to the present case.

protect individuals with disabilities or handicaps from invidious discrimination based on their disabilities, but do not protect against adverse personnel actions. They protect only those disabled persons who are otherwise qualified to perform the job in question.

Section 102 of the ADA prohibits discrimination against a "qualified individual with a disability," which is defined as an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position. 42 U.S.C. § 12111, 12112. Similarly, Section 504 of the Rehabilitation Act prohibits discrimination

against an "otherwise qualified individual with handicaps." 29 U.S.C. § 794. The Courts have consistently interpreted the phrase "otherwise qualified individual" to exclude those persons whose handicaps prevent them from performing the job requirements. See Southeastern Community College v. Davis, 442 U.S. 397 (1979) ("an otherwise qualified individual is one who is able to meet all of a program's requirements in spite of his handicap"); Cook v. U.S. Dept of Labor, 688 F.2d 669 (9th Cir. 1982), cert. denied, 464 U.S. 832 (1983) (Section 504 of the Rehabilitation Act only protects handicapped individuals who are able to adequately perform the job); Doe v. New

York University, 666 F.2d 761 (2d Cir. 1981) (an otherwise qualified individual is one who is qualified in spite of her handicap) Serrapica v. City of New York, 708 F. Supp. 64 (S.D.N.Y.), aff'd, 888 F.2d 126 (1989) (handicapped individual must be capable of meeting all of an employer's qualifications); Santiago v. Temple University, 739 F. Supp. 974 (E.D.P.A. 1990), aff'd, 928 F.2d 396 (3d Cir. 1991) (same).

In the present case, Arbitrator House specifically found that the Petitioner suffered from a permanent disability which rendered him unable to report for and to perform any of the normal work which might be available for assignment. Since Arbitrator

House's findings of fact cannot be rejected by the courts, Misco, 484 U.S. at 38, the undisputed facts establish that petitioner was not otherwise qualified for his position with Respondent. Thus, Petitioner would not be protected under the ADA or the Rehabilitation Act and Arbitrator House's award upholding Petitioner's discharge did not create an explicit conflict with the public policy against disability discrimination, as referenced by the ADA and the Rehabilitation Act.[8/] Accordingly, the Appellate Court's refusal to vacate

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8/ The same result is reached under the New York Human Rights Law, which also protects only those disabled individuals who are able to reasonably perform their jobs. See N.Y. Exec. Law § 296 et. seq.

his award is in complete accord with this court's decision in Misco.

C. Arbitrator House Did Not Exceed His Authority Under The Collective Bargaining Agreement In Upholding Petitioner's Discharge

Petitioner also contends that the Appellate Division's refusal to vacate Arbitrator House's award, on the ground that he exceeded his authority, is in conflict with the decisions of this Court. Petitioner does not assert that the Appellate Division applied the wrong legal standard. Rather, Petitioner states that Arbitrator House imposed a remedy that "directly contradicts the express language of the collective bargaining agreement" and dis-

pensed his own brand of industrial justice. Peitition at 12. The essence of Petitioner's argument is that Arbitrator House wrongly interpreted the collective bargaining agreement. Petitioner's argument conflicts with this Court's settled standard for review of arbitrators' awards and provides no basis for granting this writ.

This Court has consistently held that a court's role in reviewing arbitration awards is limited. Courts do not have the authority to reconsider the merits of an arbitration award even if the award rests on errors of fact or on a misinterpretation of the contract. Misco, 484 U.S. at 36; Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S.

593 (1960). The parties have authorized the arbitrator to interpret the language of the contract, and this interpretation may not be rejected on the ground that the arbitrator misread the agreement. Misco, 484 U.S. at 38. Thus, "as long as the arbitrator is even arguably construing or applying the contract and acting within the scope of his authority, that a Court is convinced he committed serious error does not suffice to overturn his decision." Misco, 484 U.S. at 38. Indeed, unless an arbitrator acts in excess of his authority and renders an award that does not draw its essence from the contract, the award may not be vacated. See Steelworkers, 363 U.S. at 596-97;

W.R. Grace & Co. v. Int'l Union of United Rubber Workers, 461 U.S. 757, 764 (1983); Misco, 484 U.S. at 36-38.

Petitioner concedes that the job security provision of the collective bargaining agreement permits the discharge of employees otherwise protected by that guarantee "for cause." He further acknowledges that "neglect of duty," the reason assigned by Respondent when it terminated Petitioner, is an expressly stated basis for discharge. Finally, he states that "neglect of duty" is not defined in the agreement. By these statements alone, Petitioner has demonstrated that in relying upon and interpreting this provision, Arbitrator House was at

least "arguably construing or applying the contract and acting within the scope of his authority."

In a vain effort to enlist the Court's aid, Petitioner here, as he did in the state courts, argues that a correct interpretation of "neglect of duty" can only be made by reference to a provision of a secondary document, the General Laws of the International Typographical Union, and even then only with the additional assistance of "past practice and usage." For the Court to engage in the interpretive exercise Petitioner suggests would necessarily cause the Court to substitute its judgment for that of the arbitrator against all of the principles the Court an-

nounced in Steelworkers v. American Mfg. Co., 363 U.S. 564, 567-68 (1960) and has consistently followed since. Accordingly, the instant petition has not presented an issue appropriate for review and the writ should be denied.

CONCLUSION

For the foregoing reasons, Respondent Newsday, Inc. respectfully requests that Petitioner's Petition for a Writ

of Certiorari to the Court of Appeals

for the State of New York be denied.

Dated: New York, New York
April 14, 1992

Respectfully submitted,

BRADFORD W. COUPE
(Counsel of Record)
AMBER L. KAGAN
MORGAN, LEWIS & BOCKIUS
101 Park Avenue
New York, New York 10178
(212) 309-6000

APPENDIX

1. Section 301 of the Labor-Management Relations Act provides in relevant part:

> Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

29 U.S.C. § 185(a).

2. Sections 101 and 102 of the Americans with Disabilities Act of 1990 provide in relevant part:

> § 101(8): The term "qualified individual with a disability" means an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires.

> § 102(a): No covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.

42 U.S.C. §§ 12111(8), 12112(a)

3. Section 504 of the Rehabilitation Act provides in relevant part:

> No otherwise qualified individual with handicaps in the United States, as defined in section 706(8) of this title, shall, solely by reason of her or his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency or by the United States Postal Service.

29 U.S.C. § 794

4. Section 7511 of the Civil Practice Law and Rules of the State of New York provides in relevant part:

> (a) An application to vacate or modify an award may be made by a party within ninety days after its delivery to him.
>
> (b)(1) The award shall be vacated on the application of a party who either participated in the arbitration or served with the notice of intention to arbitrate if the court finds the rights of that party were prejudiced by:
>
> (i) corruption, fraud or misconduct in procuring the award; or
>
> (ii) partiality of an arbitrator appointed as a neutral; except where the award was by confession; or
>
> (iii) an arbitrator, or agency or person making the award exceeded his power or so imperfectly executed it that a final and definite award upon the subject matter submitted was not made; or
>
> (iv) failure to follow the procedure of this article, unless the party planning vacate the award contin-

ued the arbitration with notice of the defect and without objection.

New York Civ. Prac. L. & R. § 7511

5. The New York Human Rights Law provides in relevant part:

> § 292(21): The term disability means . . . a physical, mental or medical impairment. . . which prevents the exercise of a normal bodily function or is demonstrable by medically accepted clinical or laboratory diagnostic techniques . . . provided, however, that in all provisions of this article dealing with employment, the term shall be limited to disabilities which do not prevent the complainant from performing in a reasonable manner the activities involved in the job or occupation sort or held.
>
> § 296(1)(a): It shall be an unlawful discriminatory practice for an employer or licensing agency, because of the age, race, creed, color, national origin, sex, or disability, or marital status of any individual, to refuse to hire or employ or to bar or to discharge from employment such individual or to discriminate against

such individual in compensation or in terms, conditions, or privileges of employment.

§ 296(3-a)(g): But nothing contained in the subdivision [or] in subdivision one of this section . . . shall be construed to prevent the termination of the employment of any person who is physically unable to perform his duties . . . .

(3)

No. 91-1498

Supreme Court, U.S.
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Petitioner,

v.

NEWSDAY, INC.,

Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE STATE OF NEW YORK

REPLY BRIEF TO BRIEF IN OPPOSITION

LECCI, WOLIN & WOLIN, ESQS.
By: Alan E. Wolin, Esq.
Attorneys for Petitioner
183 Broadway - Suite 316
Hicksville, N.Y. 11801
(516) 938-0030

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This brief is submitted in reply to the brief for Respondent Newsday, Inc. submitted in opposition to petitioner's Petition for Certiorari. While, petitioner continues to rely upon his arguments submitted in support of his position, he is compelled to address certain matters raised in respondent's opposition brief, Rule 15.6.

Firstly, petitioner addresses respondent's jurisdictional argument. Respondent incorrectly contends that petitioner has "failed to properly present a Federal question in the State proceedings." Contrary to respondent's assertion, the fact that petitioner originally sought vacatur pursuant to Section 7511 of the New York Civil

Practice Law and Rules rather than Section 301 of the Labor-Management Relation Act, is simply irrelevant. The fact remains that the New York State Courts expressly rejected petitioner's public policy arguments. ***See*** page 7 of petitioner's Petition for Certiorari. Even, respondent, at page 15 of its brief, acknowledges that the New York Court rejected petitioner's public policy argument. This public policy argument, as petitioner contends, is firmly rooted in Federal Law. To argue otherwise, as respondent seeks to do, insults the intelligence of this Honorable Court. Thus, no matter how initially presented, it is clear that the public policy argument is a Federal question which was presented to and rejected by the State Courts. Respondent's effort to assert otherwise must be rejected by this court.

Respondent's recitation of the facts is also characteristically inaccurate. For example, the record reflects that, contrary to respondent's assertion at page 10 of its brief, Dr. Dickman did not confirm the diagnosis of Dr. Housman. Nor did Dr. Housman say petitioner could not perform his customary duties as a handman.[1/] On the other hand free of charge petitioner's physicians Dr. Dickman and Dr. Marks both neurologist specialists noted that petitioner could return to work to perform his customary handman duties.[2/]

1/ **Dr. Housman's evaluation report in part:**

"....an occupation which required him to.... would be very difficult for this gentleman to perform."

"I think that he is disabled for any kind of work other than a sedertary position which does not require a great deal of visual tracking responses".

2/ **Dr. Dickman's evaluation report in part:**

"The above named patient continues to show considerable improvement which is more pronounced, since his last neurological examination."

"He may return to work under certain restrictions."

(continued...)

Respondent's efforts to employ Dr. Housman for a fee was nothing more than a ''sting operation'' to entrap petitioner.[3/] Arbitrator House violating the standards, blatantly biased and prejudiced, supported respondents sting operation putting petitioner in a no win position by ignoring medical evidence from two of petitioner's physicians and refusing to grant an independent medical examination upon the request of petitioner.[2/]

Respondent also improperly, as it has done all along, injects irrelevant matter into this proceeding in order to cloud the issues. For example, it utilizes an entire point arguing that ''petitioner was not a formal party to the collective bargaining agreement or the arbitration proceeding and, consequently has no standing to bring this petition''. The fact remains, that the contrary holding was reached by the New York Supreme Court Appellate Division - Fourth Department. Respondent rehashes the very same argument that the New York Court rejected. Respondent never appealed that determination. As

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2/ *(continued....)*

Dr. Marks evaluation report in part:

"There is no evidence of... neurological dysfunction or disability."

Dr. Marks testimony in part:

"....the second time he was seen the abnormality was gone."

"...and then when I saw him the third time the exam was again normal, as it had been on May 8th."

"...and my exam corroborated the May exam in that his neurologic exam was normal. And I had known that it had been in the past abnormal...
...I can say that he had improved."

3/ **Respontents letter of discharge in part:**

"Newsday has been advised by Dr. Housman that you suffer from permanently disability which precludes your return to employment at Newsday in your previous position".

such, the determination finding that petitioner **did** have standing is the law of this case and must be sustained.

Respondent's similar attempt to argue that petitioner was not ''otherwise qualified'' must also be rejected. Again, in its zeal to cloud and confuse the issues, respondent's assertion is misplaced and fatally flawed. The focus is not upon whether ''Petitioner suffered from a permanent disability which rendered him unable to report for and to perform any of the normal work which might be available for assignment.''[4/] Respondent's brief at page 27. On the contrary Respondent Dr. Housman and the Arbitrator had the best of both worlds putting petitioner in a no win position.

On the other hand, petitioner continues to assert that the requirement that an employee be able to show that he was otherwise qualified was met in this case by petitioner physicians,[2/] past practice and usage also other contractual sections and laws. We must remember that respondent not only refused to make allowances for light duty for petitioner to return to work[5/]; but that, at the time of dismissal, petitioner was a long standing employee with job guarantee.[4/] See page 4 of Petition for Certiorari. Ultimately, respondent dismissed petitioner, despite his presence on the job security list. The record revealed that respondent has a long history of not dismissing disabled employees whether permanently or

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4/ Provision of Section 3 of Contract in part:

"It is further understood that this Job Security Agreement is irrevocable.....".

5/ Respondent supervisors department letter in part:

"Frank Altamore is employed by this company as a handman..."

"We cannot make allowances for light duties in this classification."

temporarily disabled, especially those on the job security list.[6/] Not only were other disabled job guaranteed employees permitted to retain their security rights under similar circumstances including some out over 12 years; but petitioner's mere placement on the job security list insured that a physical disability would not render him unqualified, regardless of his actual ability to work. **See** page 11 and 14 of petitioner's Petition for Certiorari.

Respondent has failed to address this most important point. In any case, there was no evidence that petitioner could not perform his customary duties, contrary to respondent's who continuous assertions as to Dr. Housman and arbitrator House.

In sumary, respondent has created smoke screens, which this Honorable Court must pierce. The ''bottom line'' is that petitioner had a irrevocable job guarantees with lifetime benefits.[4/]

The fact that he became disabled, whether permanently or temporarily, should not have affected the continued retention of

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6/ **Arbitrator questioned petitioner, page 607 September 30, 1986, in part:**

"Are you saying -- I'm trying to understand -- that what happened to you thereafter was because of your having set off the N.L.R.B. Case."

Petitioner's Answer:

"Yes."

Testimony Union Chapel Chairman Robert Housman, page 65-68 January 21, 1987, in part:

Attorney's Question:

"Mr. Housman, sir, during your tenure of the various positions you've held from 1979 through 1985 was any union employee discharged for illness... "

(continued...)

those benefits. Even respondent at pages A1 through A5 of its brief acknowledge petitioner's public policy argument firmly enrooted with the facts herein. This is a most important public policy argument. Petitioner was denied the right to return to his duties because of nofactural evidence by respondent and arbitrator House.

This Honorable Court should therefore grant petitioner's Petition pursuant to the appropriate review standards.

Respectfully submitted,

LECCI, WOLIN & WOLIN, ESQS.
By: Alan E. Wolin, Esq.
Attorney for Petitioner
183 Broadway - Suite 316
Hicksville, New York 11801
(516) 938-0030

6/ ***(continued...)***

Answer:

"Not that I know of, no."

Atty Q.: **"....Chester Brown, ...out on an extended illness leave?"**

A.: **"Yes."**

Atty Q.: **"Was he ever discharged for cause?"**

A.: **"Not that I know of, no."**

Atty Q.: **"And would your answer to Mr. Chapman be the same as to Mr. Chester Brown?"**

A.: **"Yes, I would say as I recall, yes."**

(continued...)

6/ *(continued...)*

Respondent Mobilio testimony, page 1209-1213 December 4, 1986, in part:

Atty Q.: **"From the date in 1983 when you became General Foreman until you discharged Mr. Altamore was there any other employee who was on medical absence for more than 30 days?"**

A.: **"Yes."**

Atty Q.: **"....how many?"**

A.: **"Two, I believe."**

Atty Q.: **"....their names?"**

A.: **"William Chapman and Chester Brown."**

Atty Q.: **"Have they been discharged by Newsday?"**

A.: **"No."**

Atty Q.: **"....how long ..... out ill?"**

A.: **"18 months, one year."**

Atty Q.: **"Were they requested by you to submit to an examination?"**

A.: **"No, they were not."**

Testimony Union Representative Dennis O'Rouke, page 8-9, 28-30, January 21, 1987, in part:

Atty Q.: **"During your position as Chapel Chairman were there any discharges for neglect of duty as a result of a union member being unable to attend to his duties as a result of illness?"**

A.: **"No, not that I can recall."**

Atty Q.: **"....Chester Brown... ...ill for a period...?"**

A.: **"I think he was."**

Atty Q.: **"Was he discharged for cause?"**

A.: **"He was not discharged."**

Atty Q.: **"....William Chapman? ....posing the same question...."**

A.: **"Yes, he was not discharged."**

(continued...)

6/ *(continued...)*

Testimony Union Representative Maurice Naples, page 1132 December 4, 1986, in part:

Atty Q.: **"Now, while you were Chapel Chairman was there anybody who was discharged for neglect of duty as a result of their sickness or their physical inability to be present to perform their job?"**

A.: **"No, not that I know of."**

Testimony Union Representative Joe Gagnon, page 1056-1067 November 24, 1986, in part:

Atty Q.: **"During your tenure at Newsday, and more specifically as Chapel Chairman and as a member of the scale committee, were there any discharges based upon illness?"**

A.: **"Not to my knowledge."**

Atty Q.: **"Was there any discharge based upon the cause, quote, unquote, nondisciplinary reason?"**

A.: **"Not to my knowledge."**

Atty Q.: **"....any discharge for cause based upon illness?"**

A.: **"Not to my knowledge."**

Testimony Union Representative George Triant, page 1089-1100 November 24, 1986, in part:

A.: **"During my term of office as President I was aware of three members who were out on disability."**

Atty Q.: **"Do you know if any of those employee - union members were discharged?"**

A.: **"Not to my knowledge."**

Atty Q.: **"...were there any discharges of employees for prolonged illness on the basis of quote, unquote, neglect of duty?"**

A.: **"I can only answer as Chairman and President. ...there weren't any to my knowledge."**

Atty Q.: **"...were any employees... ...who were not working because of disability, ever requested to submit to a medical examination by the company?"**

A.: **"I have no knowledge."**